

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
KLEEBERG, et al., : Docket #16cv9517
 : 1:16-cv-09517-LAK-KHP
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 Plaintiffs, :
 :
 - against - :
 :
 EBER, et al., :
 : New York, New York
 Defendants. : March 12, 2019
 :
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PROCEEDINGS BEFORE
THE HONORABLE KATHARINE H. PARKER
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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E X H I B I T S

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THE CLERK: Calling case 16cv9517, Kleeberg versus Eber. Counsel, please make your appearance for the record.

MR. BRIAN BROOK: Good afternoon, Your Honor, Brian Brook for the plaintiffs.

THE COURT: Good afternoon.

MR. COLIN RAMSEY: Good afternoon, Your Honor, Colin Ramsey for the Eber defendants.

THE COURT: Good afternoon.

MR. JOHN HERBERT: John Herbert for Wendy & Lester Eber.

THE COURT: Nice to see you.

MR. ROBERT CALIHAN: Bob Calihan on behalf of the Estate of Elliot Gumaer.

THE COURT: Okay, nice to see you all. All right, I want to address a couple of the pending motions. The first is the motion to intervene. I am going to grant the motion to intervene and I'll issue a short decision on that. With respect to the pending motion to amend, I'd like to hear some additional argument on that motion and I do have some questions that I'd like the parties to address. So just as a preview, defendants argue that some of the new claims are time barred, and I'd like to understand when you're saying the claims, the statute of limitations

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2 began to accrue, and I'd like to better understand
3 when plaintiffs say that the claims accrued. So maybe
4 we can start with this motion to amend, and Mr. Brook,
5 could you explain when, the date when you think each
6 of the new claims accrued from a statute of
7 limitations standpoint?

8 MR. BROOK: Sure, Your Honor. Well, as far as
9 the breach of fiduciary duty claims, and I think
10 there's a few counts that encompass that, the
11 fiduciary tolling rule applies. And I don't believe
12 that the statute of limitations for those claims would
13 have begun to run until the fiduciary relationship was
14 terminated or openly repudiated. And I don't think
15 there is any argument that there was some kind of open
16 repudiation where Lester Eber said I'm no longer a
17 fiduciary. So it's when it terminated, and our
18 understanding is that it terminated when the trust was
19 terminated. And although there is some dispute that
20 became apparent during recent depositions as to
21 whether the trust terminated, whether Lester is still
22 a trustee, the latest that that could have occurred,
23 or earliest I guess is the way to put it, is, say,
24 February, 2017, when CNB filed its petition to
25 dissolve the trust, and that was after this lawsuit

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2 was filed, and I think these claims certainly relate
3 back. But even if they didn't, February, 2017, until
4 when we filed the proposed third amended complaint is
5 less than two years.

6 THE COURT: Okay, so the fraudulent, I mean
7 the breach of fiduciary duty, I have that the new
8 claims that you're suggesting to add would be the
9 count three for unjust enrichment, count four to set
10 aside an unlawful transaction, count five seeking an
11 order for a new election of the board, count six, a
12 declaratory judgment, and count eight, aiding and
13 abetting breach of fiduciary duty and fraudulent
14 concealment. Those are the ones that I have as new, so
15 --

16 MR. BROOK: I think it's a little more
17 complicated than that, if I may explain?

18 THE COURT: Okay.

19 MR. BROOK: So the first two counts, or at
20 least the first one is breach of fiduciary duty.

21 THE COURT: Right.

22 MR. BROOK: Well, what used to be count one
23 has been split into two counts in order to separate
24 two different theories of breach of fiduciary duty for
25 clarity sake.

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THE COURT: Right.

MR. BROOK: So they both were in the original complaint.

THE COURT: Right.

MR. BROOK: What happened for count one is that additional transactions were added, including the receipt of money for Lester Eber under a supposed consulting agreement with Southern Wine and Spirits. I think that's the one that probably, if I had to guess, was most contentious by the other side because that consulting agreement was originally entered into in 2007. And so because it's a breach of fiduciary duty claim and we are seeking equitable remedies such as an accounting, which we're still getting in pieces, and it also includes disgorgement of the profits that are received from that because it was essentially a corporate opportunity that was usurped because this was not even an acquisition or a merger, this was a transaction where it was essentially a settlement agreement between Eber Bros. and its competitor, Southern, that had driven them out of business. And Lester Eber, while remaining president and CEO of the Eber Bros. companies, also negotiated this side deal for himself. So it's something where we're seeking

equitable remedies in addition to, not only under a breach of fiduciary duty theory, but also under the standards set, I think it's in the new count four, we're citing the business corporation statute to set aside transactions that were not properly taken by the corporation.

So those are interrelated and I don't believe that there is a statute of limitations that applies for that kind of equitable remedy in this situation where you're setting aside a transaction. If it did, it would be six years from the date when the fiduciary relationship ended.

THE COURT: Which you're saying would be February of 2017.

MR. BROOK: At the absolute earliest. And that, and the trust wasn't ordered dissolved by the Court until June, 2017, but since it doesn't matter, let's just say February. And I think most of the other transactions in there I think are all part of what was in the original complaint, just spelled out in more detail.

So going through the counts, and the faithful servant doctrine, that was in the original complaint, as well, it has been spelled out in more detail

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2 because I'm one of those lawyers that likes to have a
3 complaint that tells a little bit of a story and lets
4 people know where we're going so that there is no
5 surprise, and hopefully settle the case. I don't think
6 there is anything in that that was not fairly included
7 within the original ones. But count, what used to be
8 count two, I believe, so the numbering being off is
9 why the Court is under the impression that everything
10 after count two is new, but, in fact, the fraudulent
11 concealment claim was in the original complaint, I
12 think that was count two. And the breach of --

13 THE COURT: No, I know that fraudulent
14 concealment was in the prior complaint.

15 MR. BROOK: Okay, sorry. And then I believe
16 that the aiding and abetting breach of fiduciary duty
17 was also in the original complaint, I think that was
18 count three. And then count four, if member serves,
19 was the results for an accountant.

20 Unjust enrichment, you know, I don't think
21 that the equitable, that we're not equitable.
22 Fiduciary tolling would probably not apply to that
23 count. I probably don't need it, so at the end of the
24 day I don't know if I really care about that count,
25 just to be perfectly frank, having thought about it

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2 more. But we also have the argument that separate from
3 fiduciary tolling there were material facts about what
4 made the Southern transaction wrong and usurpation of a
5 corporate opportunity that we didn't discovery until
6 discovery in this case. Most critically is the fact that
7 somehow this agreement between Eber Bros. and Southern
8 where Eber Bros. of New York agreed to go out of business
9 and not compete with Southern anymore, did not include any
10 provision against competition. That wasn't in the
11 agreement, that doesn't make any sense, what kind of deal
12 do you have to get your competitor to go out of business
13 without a noncompetition clause? Well the answer is that
14 they built it into Lester Eber's consulting agreement, and
15 because Lester was remaining at the Helm of Eber Bros., it
16 was effectively precluding Eber Bros. and its remaining
17 operating entity, Eber Connecticut, from ever competing
18 with Southern, but paying Lester a loan for that, not
19 paying the company for giving up those future business
20 opportunities it might have had.

21 THE COURT: What do you mean the loan, I thought
22 that the agreement was a consulting agreement?

23 MR. BROOK: I misspoke, I meant consulting
24 agreement. Apologize. So the consulting agreement
25 with Lester, that was what was given to him, you know,

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2 it was \$600,000 a year for several years and then in
3 the years since it's been \$310,000 a year for sort of
4 untold consulting plus tens of thousands, if not
5 hundreds of thousands of dollars a year in various
6 reimbursements. So that money, we argue, is something
7 that because it all derives from this contract that
8 had this noncompetition clause that actually bound
9 Eber Bros., because of Lester Eber remaining at the
10 helm of Eber Bros., that that is a corporate asset.
11 And because that fact was concealed until discovery in
12 this case, the statute of limitations should not run
13 on that until discovery. And then we have the two-year
14 period after discovery to assert the claim.

15 THE COURT: Are you contending that pay for
16 actual work performed under the consulting agreement
17 by Lester Eber individually, is a corporate asset?

18 MR. BROOK: Not exactly, Your Honor. I think
19 that there is certainly a right to be paid for actual
20 work, the problem is the amount of money being paid,
21 over \$3 million dollars in five years for supposed
22 part time consulting. And the fact that this contract
23 not only required some untold consulting, but also
24 included that noncompetition clause. And my reading on
25 these documents is that that is what this was really

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2 about, was about putting Eber Bros. down, but allowing
3 Lester to get that money because they still had so
4 many creditors at Eber Bros. that he wanted to avoid
5 the money going to the creditors, and instead going to
6 himself. And that's ultimately what a lot of the
7 transactions in this case are about, is all the ways
8 in which Lester Eber and his daughter tried to get
9 money to go them instead of to the creditors, and
10 ultimately to the shareholders, as well, had those
11 creditors been paid off. And the exact numbers and all
12 that I don't have off the tip of my fingers, but
13 that's what that was about is that, you know, it's
14 over \$4.5 million that was paid to Lester Eber for
15 consulting with the competitor at the same time that
16 he was getting a salary from Eber Bros. for continuing
17 to work for them and preventing Eber Bros. from
18 potential business opportunities.

19 So that, regardless of the merits of that
20 claim but going to the statute of limitations, the
21 point is that the key fact, what makes it at least
22 inflated, we're not necessarily asking for the whole
23 amount back but it's certainly inflated, and the
24 inflated amount is because of that noncompetition
25 clause in the consulting agreement that was only

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2 discovered in the course of discovery in this case and
3 that was at the earliest sometime in late 2017. I
4 personally didn't see it until mid-2018.

5 THE COURT: And are you saying your clients
6 weren't aware of the consulting agreement?

7 MR. BROOK: They were aware of the consulting
8 agreement generally, but they did not know that the
9 consulting agreement is what included the prohibition
10 against competition. And, in fact, Lester Eber misled
11 Dan Kleeberg at one point into making Dan Kleeberg
12 believe that he, as a former Eber employee, could not
13 start a business with Eber in the name of it because
14 there was a noncompetition clause with Southern.
15 Lester never told Dan Kleeberg that well only I,
16 Lester, am bound by that noncompetition clause. So
17 what it shows is Lester, himself, treated the
18 noncompetition clause in his own personal consulting
19 agreement as something that was binding on the company
20 and the entire family that had worked with him. And it
21 was a corporate asset, it was something that he sold
22 off, because it just makes no sense for a corporation
23 to agree to go out of business, sell off its
24 inventory, give a lot of it to its competitor and not
25 include a noncompetition clause in those documents.

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2 What happened here was they modified it so that Lester
3 could get paid more, but that money was money that
4 should have gone to the company because it was a
5 corporate asset, its ability to operate.

6 THE COURT: If the business is being sold and
7 going out of business essentially, what would be the
8 purpose of a noncompetition clause apart from the
9 individual owner of the seller?

10 MR. BROOK: Well the whole business, only some
11 parts like Delaware and I think Ohio were being sold
12 to Southern. New York was going out of business and
13 then Eber Bros. was continuing in Connecticut. But
14 what happened was, and that was the Eber Connecticut
15 entity, and so this noncompetition clause in Lester's
16 consulting agreement made it so that Eber Connecticut
17 and its affiliates, which included the parent
18 companies, could not ever try to go back out again and
19 do anything in New York or other states. And, in fact,
20 something we learned at a recent deposition, it's not
21 in the third amended complaint, obviously, since this
22 was two weeks ago, is that apparently Lester Eber's
23 son, David, went to work for Southern and they, rather
24 than Eber Bros. trying to sell liquors and other
25 imported goods into New York that it was bringing in

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2 from abroad because they have an import business
3 aspect, as well, they were forced to go through
4 Southern to do that. If it wasn't for this
5 noncompetition clause, the company could sell wherever
6 it wanted, it wouldn't have to go through Southern in
7 order to do something in New York. And so it is a
8 restriction on the business. And the amount is
9 certainly inflated, because \$600,000 a year for some
10 undocumented amount of, you know, a few hours here and
11 there, is ridiculously inflated as a price. And some
12 of the evidence of that is that after five years, the
13 amount that Lester was being paid for consulting was
14 cut in half.

15 THE COURT: Well what are you contending was
16 the motivation for the sale of the Eber Bros. New York
17 business and the other, outside of Connecticut, what
18 was the motivation for the sale?

19 MR. BROOK: I'm sorry, there wasn't a sale of
20 those assets and so -- there was no sale. What
21 happened was the company agreed to shut down its
22 business and Lester Eber agreed to not compete with
23 Southern in his own personal contract.

24 THE COURT: Right.

25 MR. BROOK: So the money that should have gone

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2 to Eber for shutting down, to go to its creditors and
3 maybe go to shareholders if there was some left over,
4 Lester took for himself, and that's what was wrong.
5 Because you can't, whether it's a merger, it's an
6 acquisition, or you're selling off parts of a
7 business, a corporate executive cannot say, okay, I'll
8 give you this, but you give me this on the side so
9 that I don't have to give it to the company, even
10 though it's the corporate asset. Because the
11 corporate's right to do business is what continued.
12 Maybe it would be a different situation if Lester had
13 resigned as Eber Bros. president so that restrictions
14 on him for noncompetition did not carry over onto all
15 the Eber companies. But he remained, and he continued
16 to get a salary, a six-figure salary.

17 THE COURT: It was my understanding that Eber
18 Bros. New York was not making any money and that there
19 were significant debts, is that correct?

20 MR. BROOK: Yes, there were significant debts.

21 THE COURT: Do you know what the size of the
22 debts were at the time that it shut down?

23 MR. BROOK: It's one of the many things that I
24 have sought in discovery and it's a little hard to
25 piece that together. I think -- the amount of the

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2 debts were substantial. The amount of, the money that
3 Lester had taken from Eber Bros. through this side
4 deal with Southern may very well have gone to pay the
5 company's creditors, rather than to the shareholders.
6 It doesn't matter who it would have ultimately gone to
7 because at the end of the day we're asserting
8 derivative claims on behalf of the corporation. So
9 whether my client --

10 THE COURT: Right, but how would the company,
11 what deal would have been entered into by Eber Bros.
12 that the money would have gone to it from Southern?
13 Are you saying Southern would have purchased the
14 business, that's --

15 MR. BROOK: No, I'm not saying that.

16 THE COURT: So what are you saying, I'm trying
17 to understand what you're saying should have happened,
18 how is it that Lester would have been able to get
19 Southern to give the company money sufficient to pay
20 off all of its debts?

21 MR. BROOK: Well there was, for more context,
22 there was a lawsuit filed by Eber Bros. against
23 Southern, so part of this was a settlement of that.
24 And so there was money being paid to Eber Bros. to get
25 rid of the litigation and to just get them to go away

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2 quietly. So the fact is, Southern was paying Eber
3 Bros., it was paying them to shut down business in New
4 York, to give off I believe some of their assets. Eber
5 Bros. was selling off interests that it had in
6 Delaware and Ohio businesses as well. There was a
7 large deal worth many, many millions of dollars and I
8 believe it was an eight figure sum was paid to Eber
9 Bros. by Southern. So there is no question that Eber
10 Bros. and Southern were entering into a deal whether
11 Southern was paying Eber Bros. to shut down. The
12 problem is, when Lester took some of that and siphoned
13 it off for himself, and it happened to be a critical
14 part of it which is the noncompetition provision.
15 Because what good would it do Southern to pay Eber
16 Bros. off to shut it down only to have Lester Eber and
17 Eber Bros. coming in from Connecticut or wherever, and
18 continuing to creating problems, possibly taking, you
19 know, retail sales from them.

20 And so the two-step part of that was they made
21 him a consultant, even though he was still CEO and a
22 fiduciary to Eber Bros. and they inflated the price
23 significantly to include the noncompetition clause
24 there. And that was how they had the excuse on their
25 books of paying such an inflated amount to Lester

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2 Eber. And he got that by going around the company. So
3 that, there was no signature from anyone at Eber Bros.
4 on that consulting agreement approving of it for the
5 company, as like additional compensation to Lester for
6 negotiating the deal or something. There were any
7 number of ways they could have given Lester a deal
8 bonus that was aboveboard. This wasn't one of them,
9 you can't take a corporate asset which is its ability
10 to do business, and have that part of it be sold off
11 just by giving it to Lester and letting him remain at
12 the company.

13 THE COURT: You keep saying a deal, so I'm
14 confused about what the deal is.

15 MR. BROOK: Sure. The deal was multifaceted
16 again. Southern Wine & Spirits was paying Eber Bros.
17 to shut down in New York, and it was paying Eber Bros.
18 to give up its operating assets, and I think it had 50
19 percent interest in a Delaware company and an Ohio
20 company. It was settling litigation as well. This was
21 a deal between Southern Wine and Spirits and Eber
22 Bros. Wine and Liquor Corp. and in the middle of that
23 deal --

24 THE COURT: As it a deal or was it a
25 settlement agreement?

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MR. BROOK: It was a deal. It was far more than just a settlement. In fact, I don't think that there was a document officially called a settlement, it just said that they would drop the lawsuit.

THE COURT: Okay.

MR. BROOK: I'm not 100 percent on that, it's many, many pages long.

THE COURT: Okay.

MR. BROOK: But we're getting really far into the merits of this now --

THE COURT: Right, I understand.

MR. BROOK: And I certainly understand it is a claim that requires development. It's one of the reasons why I've noticed the deposition of Southern Wine and Spirits to occur on March 25th. And so hopefully getting more information there about how this was negotiated. Because surprise, surprise, no one could remember anything about how this was negotiated during their depositions. At least nothing in terms of the details or how the amounts were determined, things like that.

So what we do have though is a record of the amount being significantly greater when there was a noncompetition clause than in later years where there

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2 wasn't one. And based on that we see at least a \$1.5
3 million enhancement to Lester as a result of that
4 noncompetition. And we will provide expert testimony
5 about how these transactions work and that in that
6 kind of situation, the company's ability to compete is
7 going to be something that should be considered a
8 corporate asset that was usurped here. Because I think
9 it is something that is technical enough that it
10 probably does require expert testimony to establish
11 that.

12 THE COURT: Okay.

13 MR. BROOK: And I don't think there is any
14 dispute that when that aspect of the transaction was
15 discovered was in discovery in this case and that
16 whenever the date when that document was produced, we
17 can use that as the date, it doesn't matter that I
18 read it several months later because it's all still
19 well within the statute. And that is separate and
20 apart from the fiduciary tolling on the first two
21 claims.

22 THE COURT: Okay. All right.

23 MR. BROOK: So you wanted to talk about counts
24 five and six -- four, five and six are the ones
25 regarding business laws and unwinding transactions.

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THE COURT: Right.

MR. BROOK: I am honestly not aware of any statute of limitation that applies to those and then the declaration of rights. A lot of those regard transactions that occurred just very recently, you know, documents that were being, transactions that were attempted in February, 2017, after this lawsuit was filed, there is no real statute of limitations argument there. I know it was confusing because the brief in opposition to the motion just said this is all outside the statute of limitations, but it's a lot more nuanced than that obviously. One of the most recent transactions that occurred was in October, 2018, when Lester sent his notice that he was going to just take my client's shares in Eber Bros. parent company for nothing. There is no way that is outside the statute of limitations.

THE COURT: Okay. All right --

MR. RAMSEY: Colin Ramsey.

THE COURT: Mr. Ramsey, yes.

MR. RAMSEY: Briefly, back to Southern, if I could, and not to get too deep in the woods, and I think Your Honor has anticipated our position is this was not a corporate opportunity, this was Lester Eber,

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2 individually, that entered into a consulting agreement
3 with Southern. Eber Bros. was essentially bullied out
4 of the market by Southern, that ship had sailed. There
5 was no corporate opportunity to usurp at that point.
6 They were out, there was an agreement amongst Southern
7 and Eber Bros. that they were going to be out of New
8 York. At that point, Lester Eber, given his numerous
9 contacts, his experience in the industry, was offered
10 this consulting position with Southern, he had every
11 right to accept it.

12 The value of that consulting agreement, and
13 Lester testified to this during his deposition, and I
14 would anticipate that when we take the deposition from
15 Southern, said, look, this is a large company, it pays
16 generous salaries, this was commensurate with what
17 other folks were getting doing similar things in
18 similar areas of the country. So I know Mr. Brook
19 wants to turn this essentially into a conspiracy that
20 Lester was somehow funneling money to himself, that
21 wasn't the case. He was receiving this money pursuant
22 to an aboveboard consulting agreement. And if there's
23 an issue with that, his consulting agreement was back
24 in 2008, and by Mr. Brook's own admission, his clients
25 were aware of it at that time. So any claims relating

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to that, I don't think there are any that are meritorious anyway, but certainly a decade later have sailed, to put it simply.

With respect to some of the other arguments that Mr. Brook made, essentially we're saying a lot of the factual predicates in this third amended complaint, a lot of the actions that are complained of, were not necessarily taken in a fiduciary capacity. He probably has a point on the fiduciary exception relationship if whatever he is relying on is taken in the capacity of a fiduciary. Many of them, at least some of them in the complaint, were not. And those are the ones, and I apologize, I don't have a brief in front of us, those are the ones that we're saying, look, if you are not doing this as a fiduciary, you don't get obviously the benefit of the fiduciary exception.

THE COURT: How much additional discovery, beyond what's already been contemplated, would be required by addition of these new claims from your perspective?

MR. RAMSEY: I don't know that it would be terrible significant. I think there would certainly be some additional depositions, one on the stock issue,

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2 for example, I think we're probably going to want
3 further depositions of Canandaigua National Bank
4 anyway, but certainly the stock issue that's raised in
5 the third amended complaint would require additional
6 depositions. Beyond that, some of the depositions that
7 are outstanding might cover that, so I don't want to
8 say, hey, look, we've got to do this whole new round
9 of depositions, but there would at least be some
10 additional discovery from our perspective now.

11 THE COURT: Okay, and how would that impact
12 the timeline for discovery?

13 MR. RAMSEY: Well, as Mr. Brook said, we've got
14 a Southern deposition noticed for the end of this
15 month, we've got the deposition of Mark Stein, the
16 brother of plaintiff, Lisa Stein, this Friday
17 actually. There's been some talk of some other third
18 parties that I think Mr. Brook wanted so I'll let him
19 speak to that. But I would think a brief extension
20 would probably be necessary, I don't think it would be
21 too terribly wrong, a month or two would be my
22 thought, subject to Mr. Brook's opinion.

23 THE COURT: Okay. Mr. Brook, from your
24 perspective, how much additional discovery would be
25 needed by these added claims and how would that impact

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2 the schedule?

3 MR. BROOK: I don't think there is any
4 additional discovery that would be needed. I think
5 the Southern deposition is more defensible with the
6 third amended complaint in there in an active claim,
7 but either way, Southern is important because this
8 money that is going to Lester Eber was ultimately what
9 was being used for him to make loans to the company.
10 So the company, he's getting \$600,000 a year from the
11 company and surprise, surprise, the company doesn't
12 have enough money to pay its debts after that point,
13 even though he's continuing to receive a six figure
14 salary from him.

15 So understanding where that money was coming
16 from and where it was going is part and parcel to
17 understanding also how this debt crisis occurred that
18 was ultimately the excuse that Lester used to take the
19 company for himself as a creditor. You know, if the
20 company had been getting \$600,000 a year from Southern
21 instead, and Lester was just given credit for making
22 that deal happen, and he was doing the same work for
23 Southern that he did for Eber Bros. you know, he'd
24 just continue to get paid by Eber Bros. for doing the
25 work for the company. If he brought the deal into the

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2 company as a CEO of the company, rather than doing it
3 on the side, the company would not have been in the
4 credit crisis that it had. And that's an important
5 part of the story that we need to tell, and
6 understanding that with Southern, so that's the only
7 one where, you know, if we had the third amended
8 complaint in we'd get more.

9 I have no idea what Mr. Ramsey is talking
10 about when he says he needs more depositions of
11 Canandaigua National Bank based on the sock issue in
12 terms of who owns the stock or not. That is an issue
13 that is going to be decided entirely based upon two
14 things, interpreting what the dissolution of the trust
15 order says and the bylaws of the company and how those
16 apply. And I think that from the depositions that
17 we've had, the last one got unfortunately very heated,
18 very emotional for Ms. Eber, you know, it's clear that
19 they are under the impression that that issue is a
20 silver bullet for them. That somehow they'll be able
21 to just take the shares for nothing based upon that
22 bylaw provision, and then Lester gets to run the
23 family business without the family in it. And I
24 believe they also brought up the intent under the Alan
25 Eber Trust document, the will, itself. So maybe we'll

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2 also look at the will. But that's something that I
3 believe is right for adjudication, and because it's
4 seen as this silver bullet, I think it really should
5 be resolved sooner rather than later, and I think it's
6 going to take that being resolved before we even have
7 a chance at seeing a real settlement offer that is
8 close to valuing what my client's claims are worth in
9 this case.

10 THE COURT: I think when we last spoke all the
11 parties were in agreement that that was a legal issue
12 that could be briefed, is that correct?

13 MR. HERBERT: I think that that's not so,
14 because it's become a much more complicated issue.

15 THE COURT: Okay.

16 MR. HERBERT: I think that the actions, the
17 acts and omissions of Canandaigua as trustee of the
18 trust after June, 2017, raise a whole host of issues
19 about the propriety of actions that they took. Some of
20 the reasons why they did what they did in 2017, we
21 frankly don't know what they, we don't know what they
22 were because Lester Eber wasn't involved in any of
23 that decision making at all, he had nothing to do with
24 it.

25 THE COURT: I see. So that's why you're saying

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2 you would need some deposition.

3 MR. HERBERT: Absolutely, yes. Yes. I
4 couldn't tell you today why, I think there's a
5 question as to whether or not the stock was allocated
6 amongst the beneficiaries in the summer of 2017, I
7 think there's a serious question as to whether or not
8 that was done appropriately. And I don't know why
9 Canandaigua did it the way they did it and we need to
10 have some deposition testimony from them to understand
11 why they did what they did and the way they did it.
12 And that has ramifications throughout all the issues
13 relating to who's entitled to which shares of stock
14 and whether or not this call right fits into the whole
15 case. So I think that we did discuss this at a prior
16 conference but I think it's become a much more
17 complicated issue since then.

18 THE COURT: So from your client's perspective,
19 there would be the additional deposition of a bank
20 representative.

21 MR. HERBERT: Absolutely.

22 THE COURT: Okay.

23 MR. HERBERT: I think one thing that's important
24 to note, in 2017, Canandaigua decided to try to terminate
25 the trust, Alan Eber Trust, and they filed their petition

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2 in February and it was finally adjudicated in June. Lester
3 and Wendy Eber, they didn't have anything to do with that
4 process at all, nothing to do with that. So what the
5 motivation was behind the bank's filing that petition,
6 whether or not they thought they were entitled to try to
7 terminate the trust, because at least on a reading of the
8 petition, the petition seems illogical to us because it
9 doesn't seem to be responsive to what the requirements
10 are in the will to be in a position to terminate the
11 trust. And then things that happened after that raise
12 a lot of questions in our mind that we need deposition
13 testimony.

14 THE COURT: Okay.

15 MR. BROOK: May I say a couple of things to
16 correct Mr. Herbert on a few things that I think are
17 really important to what he said?

18 THE COURT: Sure.

19 MR. BROOK: Lester Eber entered an appearance
20 in the action to terminate the trust, and his lawyer
21 waived any objection to terminating the trust. That's
22 why the Court entered an order saying here's how the
23 assets are going to be distributed. So for Mr. Herbert
24 to stand up and say they didn't have anything to do
25 with that is just incorrect. And that lawyer Wendy

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2 Eber said was representing her interests personally as
3 well. So any objections that they have to Canandaigua
4 terminating the trust and the Court entering that
5 order, they had an obligation to enter at the time
6 when they made an appearance in that case. If they
7 hadn't made an appearance, like my clients did not,
8 maybe they'd have some kind of an argument to do it --

9 THE COURT: Why didn't your clients make an
10 appearance?

11 MR. BROOK: Well, because, frankly,
12 termination was premature.

13 THE COURT: So why didn't your clients enter
14 an objection?

15 MR. BROOK: Because at the end of the day the
16 last thing they wanted was to have the company
17 business still in the hands of Lester and Wendy Eber.
18 And as long as the trust was around, there was a
19 serious risk that, you know, this would go on years
20 longer as a new trustee has to be appointed, and then
21 we'd have to be overseeing that trustee.

22 So when Canandaigua said they were going to
23 just try to terminate the trust and distribute the
24 shares, my clients made, we made the decision not to
25 oppose that, but not to support it either.

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THE COURT: But now you're using the basis of that to add new claims to the complaint.

MR. BROOK: Well because, at the end of the day, that order is still a Court Order that is binding on the parties that did enter an appearance there, and it's binding on my clients, too.

THE COURT: Right, but how is it, if your clients had an opportunity to object to that, you didn't appear, you chose not to appear, you chose not to object and now you want to use that transaction as the basis to add a claim against the defendants, is that right?

MR. BROOK: I think Your Honor has it backwards. They're the ones who want to undo that Court Order. We support that Court Order, we have no problem with what that Court did, with what was ordered in it, it was done completely correctly in terms of distributing the assets according to how they needed to be.

THE COURT: Okay.

MR. BROOK: And Lester Eber agreed with that and then years later Canandaigua is saying, well, we need to distribute these shares. And first there were these excuses about a missing stock book. We've

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2 recently had some emails produced to us by
3 Canandaigua's lawyer that show that, and Your Honor
4 may remember this, too, so representations had been
5 made that no one misplaced the stock book for the
6 company, that was never represented. Multiple emails
7 from Lester and Wendy's lawyer in that trust action,
8 in that Surrogates Court action, to Canandaigua's
9 lawyer saying we can't find the stock book, we're
10 going to maybe do a special trip up to Rochester to
11 try to find it.

12 So there was active obstruction going on
13 trying to prevent the Court's order from going
14 through. Because what happened was they entered an
15 appearances, they order went through, and now they
16 don't want to abide by the order that they were a part
17 of. And so we're not challenging that, we're simply
18 saying that we've been relying on that for a long
19 time, from the first time that we amended the
20 complaint after that transaction we made it clear that
21 the trust doesn't exist, that's our understanding.

22 And what Mr. Herbert's actually saying is he
23 wants to revive the trust, have this Court somehow do
24 that, even though it's a Surrogates Court order that
25 has already terminated the trust, I don't know how

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2 that's possible. But the other thing that's really
3 remarkable about their position is they think that the
4 trust still exists and should be revived by judicial
5 fiat, but that Lester Eber doesn't have any duties as
6 trustee. That somehow only he was relieved of his
7 duties as trustee. I mean obviously Mr. Gumaer also
8 passed away, so that Canandaigua is now solely the bad
9 guy. And what they are really trying to do is they're
10 trying to take advantage of the fact that we did reach
11 a settlement with Canandaigua which was very much on
12 the sidelines on this thing. The only thing they did
13 wrong was not acting more as trustee and filing suit
14 when it discovered these transactions earlier. So
15 they're trying to make Canandaigua into the bad guy as
16 much as they can and they're trying to delay this
17 thing. There is no reason why we need to depose
18 someone from Canandaigua about what they did. Nothing
19 that they did or didn't do is remotely in dispute. The
20 only question that this Court can address is a legal
21 one which is does this Court see the Court's order
22 from Surrogates Court as having impact or binding
23 authority here. I mean there's legal issues that might
24 come into play, but none of that is going to require a
25 deposition and further delay of this issue.

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THE COURT: Okay.

MR. BROOK: Thank you.

THE COURT: Hold on, let me hear from Mr. Calihan.

MR. CALIHAN: I just want it noted that the Gumaer estate has already asked for both Canandaigua depositions and they've been agreed to.

THE COURT: Um-hmm.

MR. CALIHAN: We may be arguing about the scope of those depositions but we're going to be completing Awk's (phonetic) deposition and then taking the deposition of Mr. Lowenthal. I think there is no dispute but that they are going to go forward.

MR. BROOK: I think the issue is the third Canandaigua deposition.

THE COURT: Okay.

MR. HERBERT: Let's make sure we understand what we're talking about here. Mr. Brook, it's very interesting but that's actually not what happened, okay? Canandaigua, in the winter of 2017, they decided to terminate the trust. They cobbled up a petition to be filed in the Surrogates Court. They cobbled up a final accounting with respect to the termination of the trust. It is noted in the

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2 accounting expressly that Lester Eber had nothing to
3 do with the preparation of the final accounting, okay?
4 It is true that when it came on for adjudication, that
5 Lester Eber did make an appearance there and did
6 acquiesce in the final order, okay, but all the
7 termination order did was it ordered that the assets
8 of the trust as a whole be distributed one-third, one-
9 third, one-third. It didn't purport to address how any
10 particular issue was to be allocated amongst the
11 beneficiaries.

12 So there was a process in July and August of
13 2017 where the Trust Department people at Canandaigua
14 came up with a specific allocation of the specific
15 assets in the trust. Their first attempt at
16 allocating the assets, we pointed out to them, was
17 wrong, okay, it had nothing to do with the order from
18 the Surrogates Court, this was like mop up duties that
19 Canandaigua had as a trustee. If you look at the
20 order issued by the Surrogates Court, it's all about
21 what Canandaigua has to do to finalize the
22 distribution of the trust assets. There is nothing in
23 there about what Lester Eber has to do, he didn't have
24 anything to do. Lester Eber pointed out to the people
25 at Canandaigua that they did the allocation

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2 incorrectly. Then in the month of August Canandaigua
3 went back and did a reallocation and it would be our
4 contention that we're not so sure they did that
5 correctly, and it does have ramifications on all the
6 rest of the issues.

7 THE COURT: Okay. Well I'm going to permit you
8 to ask questions about this in the depositions of the
9 Canandaigua folks whose depositions have been noticed.
10 I'm going to --

11 MR. HERBERT: Can I ask you, those are not the
12 right witnesses though.

13 THE COURT: Oh, so you need to have a
14 different person from Canandaigua?

15 MR. HERBERT: Right.

16 MR. RAMSEY: The thought was, if Your Honor
17 read the motion to intervene, we'd do an appropriate
18 notice and have them produce --

19 THE COURT: Yes, I'm granting the motion to
20 intervene and then you can notice that deposition. I'm
21 going to reserve judgment on the amendment to the
22 complaint, but I will turn to that shortly. So let's
23 talk about the discovery schedule though, it seems
24 that you're not going to meet the March 29th deadline
25 to complete fact discovery, you have an expert

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discovery deadline of May 31st right now, so I'm going to extend both deadlines by sixty days. And I'm going to schedule another conference, status conference, how would Monday, May 20th work?

MR. BROOK: That time, Your Honor?

THE COURT: Let's do 10 a.m. All right, is there anything else that any of the parties wanted to raise at this time?

MR. BROOK: I understand how burdened the Court is, I've clerked, does the Court have any sense of when we might get a ruling on the privilege issues? Because to the extent that we need to do much more discovery at all, that's really the biggest factor.

THE COURT: I understand. I'm working on it.

MR. BROOK: Okay.

THE COURT: All right, then we're adjourned. Thank you.

(Whereupon the matter is adjourned to May 20, 2019, at 10:00 a.m.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Kleeberg, et al. versus Eber, et al., Docket #16cv9517, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Date: March 25, 2019